82-462

No. ...

IN THE

Supreme Court of the United States

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ALEXANDER L. STEVAS,
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October Term, 1982

INSURANCE & PREPAID BENEFITS TRUST FOR

(a) MANUFACTURING INDUSTRIES AND RELATED SERVICES AND SUPPLIERS,

(b) RETAIL & WHOLESALE INDUSTRIES AND RELATED SERVICES AND SUPPLIERS,

(c) DISTRIBUTION INDUSTRIES AND RELATED SERVICES AND SUPPLIERS,

(d) CONSTRUCTION INDUSTRIES AND RELATED SERVICES AND SUPPLIERS,

(e) SERVICE INDUSTRIES AND RELATED SERVICES AND SUPPLIERS,

Petitioners,

vs.

RAYMOND J. DONOVAN,* SECRETARY OF UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, DISTRICT FOUR, DIVISION TWO.

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**Pursuant to Fed.R.App. P. 43, Raymond J. Donovan has been substituted for Ray Marshall as Secretary of Labor.*

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Questions Presented.

A. May Multiple Employers maintain an employee welfare benefit plan to provide health care to their employees?

B. Should a Writ of Mandate issue when the Department of Labor erroneously interprets federal law for the purpose of having the California Department of Insurance issue a cease and desist order thereby preventing multiple employers from maintaining an employee welfare benefit plan to provide health care for their employees?

TABLE OF CONTENTS

Page

Questions Presented i

I.

Opinions Delivered in the Courts Below 2

II.

Jurisdictional Statement 2

III.

Statute 2

IV.

Statement of the Case 3

V.

Basis for Jurisdiction in Trial Court 6

VI.

Argument 6

A. Multiple Employer Trusts May Maintain Employee Welfare Benefit Plans to Provide Health Care to Their Employees Under E.R.I.S.A. 6

B. A Writ of Mandate Shall Issue When the Department of Labor Erroneously Interprets Federal Law 6

Conclusion 7

INDEX TO APPENDICES

Appendix A. Judgment, Filed: July 2, 1981 ..... App. p. 1

Memorandum, Filed: July 2, 1981 2

Appendix B. Memorandum, Filed: July 15, 1982 11

Appendix C. Order. Petition for Rehearing Is Denied 13

TABLE OF AUTHORITIES

Cases	Page
Allied Chemical Corp. v. Daiflon, 449 U.S. 33, 101 S.Ct. 188 (1980)	5, 7
Baily v. Romney, 359 F. Supp. 596 (1973)	7
Hewlett-Packard Company v. Barnes (N.D. Cal. 1977) 425 F. Supp. 1294, 571 F.2d 502 (9th Cir. 1978) cert. denied 439 U.S. 831, 99 S.Ct. 108	7
Standard Oil Company of California v. Agsalud, et al. (1977) 442 F. Supp. 695, 633 F.2d 760 (9th Cir. 1978) cert. denied ... U.S. ...	7
Wilmot v. Doyle, 403 F.2d 811 (9th Cir. 1968)	5, 7
Rule	
United States Supreme Court Rules, Rule 19-1(b)	2
Statutes	
United States Code, Title 5, Sec. 701 et seq.	6
United States Code, Title 28, Sec. 1254	2
United States Code, Title 28, Sec. 1331	6
United States Code, Title 28, Sec. 1361	6
United States Code, Title 28, Sec. 2201	6
United States Code, Title 29, Sec. 1001 et seq.	6
United States Code, Title 29, Sec. 1002	7
United States Code, Title 29, Sec. 1002(1)	2, 6
United States Code, Title 29, Sec. 1332	6

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VICES AND SUPPLIERS, (c) DISTRIBUTION INDUSTRIES AND RELATED SERVICES AND SUPPLIERS, (d) CONSTRUCTION INDUSTRIES AND RELATED SERVICES AND SUPPLIERS, (e) SERVICE INDUSTRIES AND RELATED SERVICES AND SUPPLIERS pray that a Writ of Certiorari issue to review the judgment and opinion of the United States District Court and United States Court of Appeals for the Ninth Circuit to clarify and interpret the law in the area of health and care providing.

I.
OPINIONS DELIVERED IN THE COURTS BELOW.

The opinion of the United States District Court is reproduced in Appendix A. The Memorandum of the Ninth Circuit Court of Appeals is reproduced in Appendix B. A Petition for Rehearing was denied and is reproduced in Appendix C.

II.
JURISDICTIONAL STATEMENT.

The date of the judgment and the entry thereof of the Ninth Circuit Court of Appeals sought to be reviewed is July 15, 1982. An order denying a rehearing was entered on August 11, 1982. The statutory provision believed to confer jurisdiction on this court to review the judgment in question is Section 1254 of Title 28 of the United States Code and United States Supreme Court Rules, Rule 19-1(b) where a Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this court.

III.
STATUTE.

29 U.S.C. § 1002(1).

IV.
STATEMENT OF THE CASE.

Petitioners are industry trusts formed in December, 1977 and maintained by multiple employers to provide health care (RT p. 29 lines 10-12; p. 38, lines 1-2).[1] The employers contribute dues each month to the trust. The Benefit Committee/Trustee represent the employers (RT p. 46 lines 1-3; p. 85 lines 22-25). The employees have a choice of seeking health care services from their doctor in which case a percent of the bill is paid the same as medical insurance or the employee may obtain health care services from a provider of services under contract with the Petitioners in which case a greater portion of the entire bill is paid. (RT p. 62 lines 19-24; p. 65 lines 9-10; p. 67 line 20). In order to collect the dues and to obtain, process and pay claims the Petitioners hired an administrator, Insurance Benefits, Inc., a California corporation (RT p. 25 line 24).

For many years the Petitioners hounded the United States Department of Labor for an advisory letter and guidance as to their status under the Employee Retirement Income and Security Act of 1974 (E.R.I.S.A.) (RT p. 103 line 5 to p. 104 line 7). On July 23, 1979 the Department of Labor wrote as follows:

> It is the Department of Labor's view, based on the definitional provisions of ERISA as well as the overall statutory scheme, that a multiple employer plan exists where a cognizable group or association of employers establishes a benefit program for the employees of member employers or where several employers and one or more employee organizations jointly establish such a program, or where several employers contribute to a plan established by an employee organization. In

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[1]As used herein, "RT" refers to the Reporter's Transcript.

> each of these contexts there is some organization relationship among the employers, or the employees, or both in coming together and establishing a single plan. But where several unrelated employers, in establishing benefit programs for their unrelated employees, without any concerted 'sponsor' or 'settlor' activity, merely execute identically worded 'trust agreements,' 'subscription agreements,' or similar documents offered by an independent third party as a means to fund benefits, no multiple employer plan can be recognized. (EOR 1 pp. 17 and 18.)[2]

In addition to the letter being highly publicized, the United States Department of Labor on October 31, 1980 wrote to the National Association of Insurance Commissioners that a state insurance commission did not need Department of Labor approval to regulate multiple employer trusts. Cf. CCH Pension Plan Guide, paragraph 2289.

After trial, the Honorable ROBERT M. TAKASUGI ruled:

> This court finds that there was an 'association of employers' for purposes of ERISA. All participating employers had knowledge of the 1977 restructuring of IBT (i.e., its transformation into an ERISA plan) and voluntarily chose to participate in the new trust intending to provide employee benefits. Therefore, these participating employers formed an 'association' of employers insofar as they had joined together for a specific purpose. (p. 5 lines 15-22)

Prior to commencing trial, the trial judge indicated the sole issue was the correctness of the July 23, 1979 letter of the Department of Labor and that the issues of the relationship between IBT and IBI and the type of participating

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[2]Excerpts of Record will be cited "EOR."

groups would not and could not be an issue (RT p. 24 line 18 to p. 25 line 4).

However, the trial judge then ruled against Petitioners because of the possibility of abuse by IBI because of its agreement with IBT, which agreement was changed and the objectionable paragraph deleted before trial and because of the over-broad definition of employer, neither of which were issues in the July 23, 1979 letter.

The Ninth Circuit Court of Appeals in a memorandum decision found that:

> The Department of Labor exercised its discretion when it issued its opinion letter. Mandamus is not available, however, unless the act to be compelled is mandatory or ministerial. *Wilmot v. Doyle*, 403 F.2d 811, 816 (9th Cir. 1968). *See also Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 35-36, 101 S.Ct. 188, 190 (1980).
>
> We also agree with the district court's finding that the power to make final decisions rested in IBI rather than in IBT. The other issues raised on appeal are not properly before us due to the limited scope of review of a denial of mandamus.

Thus, the technical question is if mandamus lies to correct an erroneous interpretation of federal law by a federal regulatory agency when the agency has no duty to interpret the law but elects to interpret the law and does so incorrectly.

The real policy question before the court is if the small interstate corporate employers may bind together to provide health care free from the regulation of the State Insurance Commissioners but subject to regulation by the United States Department of Labor.

V.
BASIS FOR JURISDICTION IN TRIAL COURT.

Federal Jurisdiction and venue were invoked under Title 28, Section 1331, Title 28, Section 1361, Title 28, Section 2201, Title 29, Section 1332, and Title 5, Section 701 *et seq.*, all of the United States Code. Jurisdiction was also conferred upon the court in that a federal question arose from a dispute over the interpretation of a federal statute, 29 U.S.C. § 1001, *et seq.*

VI.
ARGUMENT.

A. Multiple Employer Trusts May Maintain Employee Welfare Benefit Plans to Provide Health Care to Their Employees Under E.R.I.S.A.

29 U.S.C. § 1002(1) provides ". . . Employer Welfare Benefit Plan means any plan . . . maintained by an employer . . . to the extent that such plan . . . is maintained for the purpose of providing for its participants . . . (health care benefits)."

The statute is clear in that it applies to single employers as well as multiple employers. The question is whether or not a Writ of Mandate should issue to correct a misrepresentation of the law when the Department of Labor published a letter claiming the status requires an "organizational relationship among the employers, or the employees, or both in coming together and establishing a single plan."

B. A Writ of Mandate Shall Issue When the Department of Labor Erroneously Interprets Federal Law.

The Department of Labor had discretion to determine whether or not it interprets federal law under E.R.I.S.A. for purposes of declining regulation. However, the Department of Labor has a ministerial duty and mandatory

duty to correctly interpret the law once it exercises its discretion. *Baily v. Romney*, 359 F. Supp. 596 at 599 (1973); *Wilmot v. Doyle*, 403 F.2d 811, 816 (9th Cir. 1968) and *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 35-56, 101 S.Ct. 188, 190 (1980). A Writ of Mandate should issue as it is a ministerial act to correctly interpret federal statutes.

CONCLUSION.

The small employers involved in interstate commerce have been given a uniform law under E.R.I.S.A. free from the interference of the various state insurance regulatory bodies. The cost of the health care is substantially cheaper than the cost of insurance which caters to large businesses. However, the United States Department of Labor has erroneously interpreted the statute under 29 U.S.C. § 1002 by requiring an organizational relationship in the form of something more than an association. Based upon the incorrect interpretation of the law, the Department of Labor refuses to regulate the 11,000 employee participants of Petitioners and the state regulatory agencies namely, the California Department of Corporations and Department of Insurance similarly refuse regulation based upon the law and past decisions namely *Hewlett-Packard Company v. Barnes* (N.D. Cal. 1977) 425 F. Supp. 1294, 571 F.2d 502 (9th Cir. 1978), cert. denied 439 U.S. 831, 99 S.Ct. 108 and *Standard Oil Company of California v. Agsalud, et al.* (1977) 442 F. Supp. 695, 633 F.2d 760 (9th Cir. 1978), cert. denied .... U.S. ....

Consequently, 11,000 participants do not know if they are involved in a legal or illegal health care plan and a void exists which permits IBT to collect funds for health care without regulation and further permits other health plans who may employ unscrupulous individuals to collect funds for health care and expropriate those funds.

For the reasons set forth in this document, Petitioners plead for and respectfully submit that a Writ of Certiorari should issue as prayed and that the judgment of the Ninth Circuit Court of Appeals and the United States District Court should be reversed by the issuance of a Writ of Mandate directed to the United States Department of Labor.

Respectfully submitted,

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